Morgan Services, Inc. *and* Daisy Sanders, Petitioner *and* Local 969, Chicago and Central States Joint Board, Unite, AFL–CIO. Case 13–RD–2390

June 30, 2003

ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

This case is before the Board on the Union's exceptions to the hearing officer's Second Supplemental Decision on Objections. In her supplemental decision, the hearing officer recommended overruling the Union's objections to conduct affecting the April 5, 2002 decertification election and recommended certifying the results of the Union's 29 to 33 loss, with no challenged ballots. Before the Board, the Union claims that the hearing officer erred on a variety of matters, including, inter alia, her failure to analyze whether, as the Union alleged in Case 13–CA–39599, the Employer unlawfully altered past practice concerning implementation of the provision in the parties' collective-bargaining agreement that granted the Union access to the Employer's facility to police the contract. The Union claims that the allegedly unlawful change, and its resulting denial of access throughout the critical period, created an impression in the minds of employees that selection of the Union as bargaining representative was meaningless. At the hearing, the parties stipulated that an arbitrator had taken testimony on the alleged contract violation and was then considering the grievance. In its charge, the Union claims that the change violated Section 8(a)(5) of the Act, but the Regional Director deferred the charge on November 2, 2001, pending its arbitration.

The Board has delegated its authority in this proceeding to a three-member panel.

We have considered the decision and the record in light of the exceptions and briefs, and have decided to hold our decision of this case in abeyance, pending the arbitrator's decision on the access dispute and the General Counsel's decision on the deferred unfair labor practice charge in Case 13–CA–39599. Considering the arbitrator's decision along with the Union's election objections may help avoid inconsistent outcomes and would respect the parties' decision to resolve disputes through the arbitration machinery. Moreover, exercising our discretion to hold the objections in abeyance here is consistent with cases in which the Board has held resolution of challenged ballots in abeyance pending determination of voter eligibility through contractual grievance/arbitration machinery. See *Mono-Trade Co.*, 323 NLRB 298, 298–299 fn. 2 (1997); *Toyota of Berkeley*, 306 NLRB 893, 897-898 (1992); *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1365–1366 (1962).

Accordingly, IT IS ORDERED THAT the Union and the Employer shall file a report as to (1) the current status of the arbitration and (2) the Union's deferred unfair labor practice charge. If the arbitrator has not yet issued a decision, the Union and the Employer shall file such status reports with the Board every 90 days until the arbitrator does so. When the arbitrator issues a decision, the parties shall forward to the Board a copy of that decision and a copy of any action the General Counsel has taken on the Union's deferred unfair labor practice charge. If the arbitrator fails to issue a decision after a reasonable period, the parties may apply to the Board for further review of this proceeding. See *Mono-Trade Co.*, supra.[1]

Dated, Washington, D.C. June 30, 2003

Wilma B. Liebman, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

I would not hold the Union's objections in abeyance pending the arbitrator's decision on whether the Employer violated the parties' collective-bargaining agreement by restricting the Union's access to its facility. Even if the arbitrator were to hold that the restrictions were in breach of contract, and even if that holding supported a finding of an 8(a)(5) "unilateral change" viola-

[1] Our dissenting colleague would not hold this case in abeyance because the change in the employer's access policy occurred outside the critical period. At an earlier stage of this proceeding, however, the Board decided that the Employer's prepetition access restrictions "must be considered, as at the very least they lend meaning and dimension to the alleged post-petition objectionable conduct." Order granting the Union's request for review, at 1 (Nov. 8, 2002). By following this language in our original Order, our decision today merely adheres to the law of the case. See, e.g., *Technology Service Solutions*, 332 NLRB 1096, 1096 fn. 3 (2000) (recognizing that unpublished orders of the Board establish the law of the case to be followed in subsequent proceedings); accord *Virginia Concrete Corp.*, 338 NLRB No. 183, slip op. at 2 (2003).

In any event, even if the law of the case did not bind us, our Order today merely directs the parties to submit the arbitrator's decision and related supplemental material for our review. As such, we believe that Chairman Battista's argument is premature, and would be better considered after we receive supplementary material from the parties.

tion, that would not result in the setting aside of the election. Such a unilateral change cannot support a finding of objectionable conduct, since any change occurred in July 2001, i.e., prior to the filing of the first petition in September 2001 and therefore outside the critical preelection period. See *Ideal Electric*, 134 NLRB 1275 (1961). The Employer's continued enforcement of the allegedly changed access rule during the critical period does not warrant a contrary result. In *Kokomo Tube Co.*, 280 NLRB 357, 358 (1986), the Board found that a wage increase that was both announced and effective before the critical preelection period could not serve as the basis for setting aside the election.[1] In that case, the employer violated Section 8(a)(3) by granting an unlawful wage increase effective several days prior to the filing of an election petition. The employees received the pay increase 4 days after the filing date. The Board disagreed with the judge that the payment was objectionable, finding instead that the wage increase was effective before the critical preelection period, and thus, under *Ideal Electric*, could not serve as a basis for setting aside the election.[2] Similarly, in this case, the change was effective before the critical period. The fact that there were denials of access during the critical period does not detract from the fact that the change was effective prior to the critical period. Thus, the change cannot be a basis for setting aside the election.

My colleagues posit the contention that conduct within the critical period cannot be viewed in isolation. That is, the conduct must be viewed in the context of earlier conduct. This would be correct if the conduct within the critical period were itself subject to attack. However, as discussed above, that conduct is not subject to attack. The change in access occurred before the critical period and simply continued into the critical period. Under settled law, that conduct within the critical period is not subject to attack.[3]

Dated, Washington, D.C. June 30, 2003

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Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

[1] *Kokomo Tube* was overruled *in other respects* in *Spring Industries*, 332 NLRB 40 (2000).

[2] Compare *Scott Glass*, 261 NLRB 906 (1982), where a pay raise announced the day before the petition was filed, but effective and first paid within the critical period, was found to be objectionable.

[3] The Board's Order of November 8, 2002, did not deal with this matter.